FILED AUGUST 15, 2013

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of	)	Case Nos.: **11-O-17398-RAH**
	)	(11-O-18576; 12-O-10964;
ROBERT G. SCURRAH, JR.,	)	12-O-11488; 12-O-12239;
	)	12-O-12703); 12-O-14401
Member No. 82766,	)	(12-O-14602; 12-O-17028) Cons.
	)	
A Member of the State Bar.	)	**DECISION**
	)	

Introduction[1]

Respondent Robert G. Scurrah, Jr., is charged with violations of California Civil Code § 2944.7, which, if proven, would subject him to discipline under Business and Professions Code § 6106.3.

Respondent has developed a large and rather sophisticated loan modification practice, CDA Law Center (CDA), which, by his account, has benefited many homeowners facing severe financial challenges. The Office of the Chief Trial Counsel of the State Bar of California (State Bar), by Deputy Trial Counsel Anthony Garcia, asks this court to discipline respondent for his willful violation of Civil Code § 2944.7 by recommending an actual suspension of one year. Respondent, by his counsel Mark N. Zanides and David Cameron Carr, argue that no culpability should be found, or, if found, this matter should result in discipline substantially below that requested by the State Bar.

[1] Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

As set forth in more detail in this decision, pursuant to the rule set forth in *In the Matter of Taylor* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 221, this court disagrees with respondent's assertion that he should be found to have no culpability. However, because of the unique facts of this case, including the extraordinary steps respondent took to assure his compliance with Civil Code § 2944.7, as well as his reliance on the actions of the State Bar in reviewing his business model, the court feels that discipline in an amount substantially less than that recommended by the State Bar is appropriate.

Significant Procedural History

There were two Notices of Disciplinary Charges filed in this action, on September 26 and December 18, 2012. The two cases were consolidated and trial commenced on April 15, 2013.[2] The matter was submitted for decision on May 21, 2013.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on November 29, 1978, and has been a member of the State Bar of California at all times since that date.

Issues Common to All Matters

The specific facts applicable to each matter are discussed below. However, certain characteristics of respondent's business model common to all the matters involved in this case are relevant to determine whether or not he complied with Civil Code § 2944.7. In each case in this proceeding, the client employed respondent to attempt to obtain a mortgage loan modification on his/her behalf. Further, respondent obtained payment by automatic transfer from each client's bank. As such, each of these clients signed an ACH withdrawal authorization that authorized respondent to withdraw money directly from their accounts when the services for a given phase were complete. For each case respondent handled, he prepared an initial analysis

[2] On April 15, 2013, respondent filed a motion to dismiss. Said motion is denied.

using the REST Report. This report is generated by a software program which uses a complex algorithm that determines, among other things, the Net Present Value (NPV) of the loan. Loan servicers use this same program to determine if the loan should be modified.[3] Respondent charged his clients a separate fee, usually $595 for preparation of this report.

Legislation Regulating Loan Modification[4]

In 2009, state laws were enacted to protect homeowners facing foreclosures. California legislators sought to curb abuses by "a cottage industry that has sprung up to exploit borrowers who are having trouble affording their mortgages, and are facing default, and possible foreclosure, if they are unable to negotiate a loan modification or any other form of mortgage loan forbearance with their lender." (Sen. Com. on Banking, Finance, and Insurance, Analysis of Sen. Bill No. 94 (2009 Reg. Sess.) as amended Mar. 23, 2009, pp. 6-7.)

On October 11, 2009, California Senate Bill number 94 (SB 94) became effective, providing two safeguards for borrowers who employ the services of someone to help with a loan modification: (1) a requirement for a separate notice to borrowers that it is not necessary to use a third party to negotiate a loan modification (codified as Civ. Code, § 2944.6);[5] and (2) a

[3] A loan that is "NPV positive" is one that is a good candidate for modification. On the other hand, a "NPV negative" result would warn respondent's firm that they needed to advise the client, and if the client wanted to go forward, they would have to do whatever they could to avoid denial.

[4] Much of the discussion in this section is taken directly from the review department's decision in *In the Matter of Taylor*, *supra*, 5 Cal. State Bar Ct. Rptr. 221.

[5] Civil Code section 2944.6 requires that before entering into a fee agreement, a person attempting to negotiate or arrange a loan modification must provide the borrower the following information in 14-point font "as a separate statement:"

> It is not necessary to pay a third party to arrange for a loan modification or other form of forbearance from your mortgage lender or servicer. You may call your lender directly to ask for a change in your loan terms. Nonprofit housing counseling agencies also offer these and other forms of borrower assistance free of charge. A list of nonprofit housing counseling agencies approved by the United

proscription against charging pre-performance compensation, i.e., restricting the collection of fees until all loan modification services are completed (codified as Civ. Code, § 2944.7).[6]

The new legislation was designed to "prevent persons from charging borrowers an up-front fee, providing limited services that fail to help the borrower, and leaving the borrower worse off than before he or she engaged the services of a loan modification consultant." (Sen. Com. on Banking, Finance, and Insurance, Analysis of Sen. Bill No. 94 (2009 Reg. Sess.) as amended Mar. 23, 2009, p. 7.) A violation of either Civil Code provision constitutes a misdemeanor (Civ. Code, §§ 2944.6, subd. (c), 2944.7, subd. (b)), and is cause for imposing attorney discipline. (Bus. & Prof. Code, § 6106.3.)

Recently, the review department of the State Bar Court filed its opinion in *In the Matter of Taylor*, *supra*, 5 Cal. State Bar Ct. Rptr. 221. In its opinion, the review department specifically found Civil Code § 2944.7 to be clear on its face, stating:

> The language of Civil Code section 2944.7, subdivision (a), plainly prohibits *any person* engaging in loan modifications from collecting *any fees* related to such modifications until *each and every* service contracted for has been completed. (*In the Matter of Jaurequi* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 56, 59 [plain language of statute controlled where meaning lacked ambiguity, doubt, or uncertainty].) [footnote] We find nothing ambiguous about the statute's language, or the legislative history, which provides that "legal professionals" are one of the groups the bill was designed to reach. [footnote] (See 4 Miller & Starr, Cal. Real Estate (3d ed. 2011) § 10:145.10 [statute directed at brokers and attorneys who, as self-styled consultants, were holding themselves

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States Department of Housing and Urban Development (HUD) is available from your local HUD office or by visiting www.hud.gov.

[6] The relevant portion of Civil Code section 2944.7 reads:

> (a) Notwithstanding any other provision of law, it shall be unlawful for any person who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower, to do any of the following: (1) Claim, demand, charge, collect, or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform.

out as able to facilitate loan modifications, "but usually produced no worthwhile results after collecting substantial advance fees from desperate homeowners"].)

(*Id*. at p. 232.)

This court is bound to follow this interpretation of the statute.

Respondent's Business Model

Respondent used a business model that broke up his services into phases. After completion of each of these phases, he would compensate himself from funds he received from an ACH agreement with his clients, allowing him to withdraw funds directly from the client's bank account. He and his clients had success with this method of doing business. By his own unrebutted evidence, he had an 88.5% success rate during the period he kept such statistics (the last 17 months). He has assisted over 3,500 homeowners seeking to modify their loans, and, where successful, has allowed them to keep their houses.

Before the passage of SB 94, respondent and his operation's manager, William Baskin, were informed of the bill's impending passage by Martin Andelman (Andelman). Andelman had developed expertise in the loan modification process, and maintained an influential blog chronicling the development of regulations in the loan modification industry. Andelman had access to several individuals who were actively working on the pending bills in the California Legislature, and he shared that information with several followers of his blog. Specifically, Andelman was particularly interested in understanding the meaning of the bill's language with respect to a lawyer's ability to separate the services into component parts, allowing partial payment of the full fee after full completion of each individual component, also known as "unbundling." In this regard, Andelman spoke with Eileen Newhall (Newhall)[7] shortly after the passage of SB 94, who confirmed that the legislature intended to prohibit separation of services

[7] Newhall was the legislative chair for Senator Calderon, the sponsor of SB 94.

by real estate professionals, but not with respect to lawyers. (Exhibit VVVVVV, paragraph 48.) This information was passed on to respondent.

Respondent and Andelman also spoke with Julie L. Greenfield (Greenfield). Greenfield was a seasoned attorney with a strong background in real estate lending, regulation, and compliance. She had been retained by the State Bar to counsel it on the implementation of the regulations contemplated by SB 94. Greenfield told respondent and Andelman that SB 94 did not prohibit a lawyer from unbundling legal services. Respondent has continued to discuss these matters with Greenfield, who remains resolute in her interpretation of SB 94, albeit recognizing the contrary interpretation in the *Taylor* case.

Respondent also spoke with Steven Feldman (Feldman), an attorney who also performed loan modification services and who had taken a special interest in the development of the law involving SB 94. Feldman told respondent that the State Bar had informed him that unbundling was permitted.

In response to the information gleaned from the above individuals, as well as several others participating in a consortium of loan modification attorneys, respondent conformed his business model and his retainer agreements to comply with his understanding of the meaning of SB 94. As such, respondent's retainer agreements involved in this proceeding call for the separation of services to be provided to the client into three phases, with payment for each phase collected after the performance of services in that phase. As noted above, each of these clients signed an ACH withdrawal authorization that authorized respondent to withdraw money directly from their accounts when the services for a given phase were complete.

In November 2009, a month after the passage of SB 94, the State Bar published an advisory distributed to the public in "Frequently Asked Questions" format (the FAQ). (See Exhibit G.) The FAQ does not mention unbundling as an issue of concern to the State Bar.

In 2010, the head of the taskforce appointed within the Office of the Chief Trial Counsel, Suzan Anderson, wrote and published a Continuing Legal Education Self Study Article entitled "Loan Modification 101 – Everything You Ever Wanted to Know about Loan Mods but were Afraid to Ask." (Exhibit H.) As with the FAQ, nothing in this article referenced whether or not unbundling was allowed.

On January 15, 2011, respondent attended a MCLE program given by the Orange County Bar Association entitled "Mortgage Loan Modifications and HAMP: Nuts and Bolts." (Exhibit J.) The program participants were Samuel C. Bellicini, a State Bar Court respondents' counsel; Greenfield, a State Bar consulting attorney on loan modification; and Andelman. The program provided a general primer for those interested in representing parties in loan modifications. The materials provided a list of limitations imposed on attorneys under SB 94, and conspicuously absent was any reference proscribing unbundling. (Exhibit J at page 393.) In fact, the materials specifically stated: "California Attorneys have divided Modification services into separate Retainer Agreements and receive payment after specified services have been performed."

The Early Investigation of Respondent by the State Bar

Respondent received a letter dated February 8, 2011, from Investigator Eronobi of the State Bar regarding respondent's client, Harold Fields (Fields). (Exhibit Z.) Apparently, Fields felt that respondent was violating SB 94 by accepting fees before all work was done. On March 8, 2011, respondent wrote to Investigator Eronobi and provided him with copies of his retainer agreements.[8] Respondent pointed out to Eronobi that his prior conversations with Newhall and Andelman supported his position that unbundling was allowed under the law.

[8] The Fields agreement does not substantively differ in substance from those at issue in this proceeding, in particular with respect to the unbundling issue.

Similarly, by letter dated June 20, 2011, State Bar investigator Jesse Cisneros (Cisneros) requested information from respondent regarding respondent's client, John Dise (Dise). (Exhibit V.)[9] This letter also asked for an explanation as to why respondent received an advance fee before the loan modification was finished. Cisneros referred to the allegations as a "direct violation of Civil Code, section 2944.7."

Cisneros also wrote a June 17, 2011 letter to respondent regarding respondent's client, Natasa Franjic. (Exhibit P.) This letter also requested, among other things, an explanation as to whether respondent collected fees in advance of completion of the loan modification.

Respondent retained attorney Jon Dieringer to represent him with respect to the Dise and Franjic matters. Dieringer responded to both of these matters by enclosing a copy of the retainer agreement and answering several of the complaints raised by the State Bar investigators.

The September 17, 2011 State Bar Annual Meeting Presentation

At the 84th Annual Meeting of the State Bar of California, Supervising Trial Counsel Suzan Anderson (Anderson) gave a presentation on loan modifications. In the materials, Anderson, for the first time, publicly stated that she considered unbundling to be a violation of SB 94. (Exhibit I.) The materials were prefaced with a disclaimer that stated that the points of view or opinions stated in these materials are those of the author [Anderson] and not the official policy of the State Bar.

State Bar Investigator Closes Dise, Franjic, and Fields; State Bar Approves Respondent's Retainer Agreement Phased Payments

On September 19, 2011, two days after the Annual Meeting, Investigator Benson Hom (Hom) sent a letter to Dieringer stating that he had completed the investigation in the Fields case

[9] The Dise agreement also does not differ in substance from the retainer agreements at issue in this case.

and that "[w]e have determined that this matter does not warrant further action. Therefore, the matter is closed."

On October 24, 2011, Dieringer spoke with Hom by telephone. Dieringer credibly testified that during that conversation, he asked Hom whether the State Bar found anything wrong with the Franjic retainer agreement. Dieringer testified that Hom stated that he did not. Dieringer then specifically asked whether there was any impropriety involving the phased payments, and he was told that there was no impropriety with respondent's phasing of components of his representation, and being paid after completion of each. Dieringer immediately told respondent about his conversation with Hom and the State Bar's position on these two matters. This was confirmed by Hom in a letter also dated October 24, 2011. (Exhibit S.) In that letter, he stated that "[m]y Trial Counsel informs that the retainer is a flat fee, in phases."[10] Dieringer and Hom spoke again on the telephone, and Dieringer confirmed Hom's conclusion regarding phased payments in an October 27, 2011 letter to Hom, stating as follows: "You mentioned that the State Bar finds no impropriety in the phased payments received for the services rendered." (Exhibit T.) Hom did not testify in this matter.[11]

Finally, in a November 10, 2011 letter, the State Bar similarly closed the Dise matter, stating the same language: "We have determined that this matter does not warrant further action. Therefore, the matter is closed." (Exhibit Y.) Similarly, by letter dated November 17, 2011, the State Bar used the same language in closing the Franjic matter. (Exhibit U.)

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[10] Hom still took issue with a $595 fee charged by respondent, and asked that it be refunded. He advised respondent that if he were to refund the $595, "then this matter will be closed between Respondent and Complainant."

[11] Presumably, Hom's testimony would not have been favorable to the State Bar. The court is entitled to draw such an inference by his failure to testify at trial. (Cal. Evid. Code, §§ 412, 413; *Breland v. Traylor Engineering & Manufacturing Co.* (1942) 52 Cal.App.2d 415, 426 ["A [party] is not under a duty to produce testimony adverse to himself, but if he fails to produce evidence that would naturally have been produced he must take the risk that the trier of fact will infer, and properly so, that the evidence, had it been produced, would have been adverse."].)

All of the clients involved in this proceeding signed their retainer agreements before November 2011, except Thompson, who signed his retainer agreement on December 1, 2011.

Duenas v. Schwarzenegger

In or around mid to late summer 2011, respondent became aware of the State Bar's position in a case entitled *Duenas v. Schwarzenegger* (N.D. Ca. 2010) 3:10-cv-05884 RS. Duenas claimed that the State Bar was expansively interpreting SB 94 in a manner that would prevent the public from retaining counsel for any mortgage related services. The State Bar disagreed that SB 94 should be given such a broad interpretation. Rather, the State Bar stated in briefs that the "each and every service" language in the statute referred only to the "negotiating, arranging (or attempting to do either) or otherwise performing a loan modification which the individual/business has contracted to perform or represented will perform. It does not refer to *any* mortgage or foreclosure related service." (See exhibit A, pp. 181, emphasis in original.)

Respondent and his staff took solace in the language of the State Bar in *Duenas* because they felt it clearly recognized the propriety of unbundling. It did not. While the court does not agree with respondent's position as to the import of the State Bar briefs in the *Duenas* matter, the briefs do have some significance to this proceeding. What the briefs did *not* do is explicitly state that unbundling is or should be prohibited. Instead, the State Bar used language that could be interpreted favorably by either side in the dispute regarding unbundling. Perhaps the language most favorable to respondent in the State Bar's brief was as follows:

> "[S]ection 2944.7(a)(1) … merely regulates the *timing* of a homeowner's payment of fees to any person for negotiating, arranging or performing a loan modification, *that is, the payment to persons for dealing directly with a lender or mortgage servicer on a homeowner's behalf."*
>
> (Exhibit A, pp. 160, emphasis added.)

Reading the above, respondent was encouraged to draw the distinction between advance payment for preparing documents versus "dealing directly with the lender or mortgage servicer."

As such, this language confirmed what he thought was the State Bar's position which prompted the State Bar to close the investigative matters referred to above.

State Bar Recommends Use of "Separate" Retainer Agreements.

In December 2011, respondent was actively discussing another matter under investigation by the Office of the Chief Trial Counsel of the State Bar. Again, the payment of advanced fees was the issue. In March 2012, respondent's associate, Jon McGrath had a conversation with Deputy Trial Counsel Tim Byer from the State Bar, who suggested that to remedy the problem, respondent might consider using separate contracts for each phase of work. Relying on this advice, respondent immediately revised his retainer agreements to separate them into phases, with separate contracts. (Exhibits B, C, D, and E.)

Scurrah v. State Bar of California

The State Bar continued to prosecute loan modification cases into late 2012. Given the confusion respondent faced, in September 2012, he filed a complaint in the Orange County Superior Court seeking declaratory relief and injunctive relief, in order to prevent the continued prosecution of such cases until a definitive ruling could be obtained. This matter was entitled *Scurrah v. State Bar of California, Jayne Kim, etc.*, case no. 30-2012-00595756 (the Orange County case).

In November 2012, the State Bar Court review department filed its opinion in *Taylor*. Thereafter, respondent filed an ex parte application for a temporary restraining order in the Orange County case. (Exhibit A, pages 229, and following.) Respondent was encouraged by the superior court's tentative ruling,[12] but in the end, the court denied the application for a temporary

[12] The superior court stated the following in its tentative ruling:

> "Plaintiff correctly posits that §2944.7 requires the lawyer to either (1) present a client with dozens of separate retainer agreements for discrete acts or (2) forgo formal "modification" efforts and run instead directly to the courthouse

restraining order, indicating that it lacked jurisdiction to grant the application. As of trial in this matter, respondent indicates that the Orange County case is still pending after the filing of an amended complaint on a different theory of recovery.

Continued Use of Unbundled Retainer Agreements

Despite the ruling in *Taylor*, respondent continues to contend that his business model is consistent with Civil Code § 2944.7. He feels that the interpretation of SB 94 by the review department is incorrect. As such, as of the date of the trial in this matter, he had continued to accept and represent clients using three separate retainer agreements. At trial, respondent stated that in order for him to stay in business, it was necessary that he charge and collect advanced fees in loan modification cases.

Case No. 11-O-17398 – The Napoles Matter

Facts

On August 28, 2011, Maria Napoles (Napoles) employed respondent, through CDA, to provide loan modification services on her behalf. (Exhibit HH.) On September 1, 2011, CDA withdrew $595 from Napoles's bank account. (Exhibit LL.) On September 10, 2011, CDA withdrew $1,650 from Napoles's bank account as payment for legal services. (Exhibit LL.) Respondent collected these fees from Napoles prior to completing all of the loan modification services he had contracted to perform.

On September 14, 2011, Napoles telephoned CDA, terminated respondent's employment and requested a refund of the fees that had been paid. (Exhibit DD.) On February 6, 2012,

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steps to litigate freely. … Plaintiff alleges that the State Bar is taking §2944.7 one step further and engrafting onto it an "anti-unbundling" rule similar to that contained in B&P §10026 for non-lawyers. The Legislature intentionally excluded lawyers from the "anti-unbundling" prohibition, and by negative implication permits lawyers to continue using multiple, limited-scope retainer agreements to capture aspects of loan modification servicing." (Exhibit A, page 283. Emphasis added.)

respondent refunded $2,345 to Napoles. (Exhibit MM.) The amount refunded was $100 more than the amount that respondent collected from Napoles.

Conclusions

Count One - (§ 6106.3, subd. (a) [Violation of Civil Code section 2944.7, subd. (a)])

Section 6106.3, provides that an attorney's conduct in violation of Civil Code section 2944.7, subdivision (a), constitutes cause for the imposition of discipline. By claiming, demanding, charging, collecting, or receiving compensation before he fully performed each and every loan modification service he had contracted to perform or represented he would perform, respondent violated Civil Code section 2944.7, subdivision (a). As such, respondent has violated section 6106.3.

Case No. 11-O-18576 – The von Goetz Matter

Facts

On June 9, 2011 Mary von Goetz employed respondent, through CDA, to provide loan modification services on her behalf. (Exhibit QQ.) On June 15, 2011, CDA withdrew $1,450 from von Goetz's bank account as payment for legal services. (Exhibit VV.) On June 16, 2011, CDA withdrew $595 from von Goetz's bank account. (Exhibit VV.)[13] On July 5, 2011, CDA withdrew $1,422 from von Goetz's bank account. Respondent collected these fees from von Goetz prior to completing all of the loan modification services he had contracted to perform.

On June 27, 2011, CDA sent the loan modification proposal and the supporting documentation, including the REST Report, to von Goetz's mortgage servicer, Select Portfolio Servicing, Inc. (SPS). (Exhibit OO.) In August 2011, SPS denied von Goetz's loan modification request due to insufficient income. (Exhibit OO.)

[13] On June 24, 2011, CDA withdrew $1,450 from von Goetz's bank account, but CDA recognized its mistake and the $1,450 taken by mistake was returned to von Goetz's account three days later. (Exhibit VV.)

Conclusions

Count Two - (§ 6106.3, subd. (a) [Violation of Civil Code section 2944.7, subd. (a)])

By claiming, demanding, charging, collecting, or receiving compensation before he fully performed each and every service he had contracted to perform or represented he would perform, respondent violated Civil Code section 2944.7, subdivision (a). As such, respondent has violated section 6106.3.

Case No. 12-O-11488 – The Thompson Matter

Facts

On December 10, 2011, Aron Thompson (Thompson) employed respondent, through CDA, to provide loan modification services on his behalf, and on that same day, Thompson signed an ACH authorization and returned both documents to CDA. (Exhibit XX.) On December 30, 2011, CDA withdrew $1,450 from Thompson's bank account as payment for legal services. (Exhibit ZZ.) Respondent collected these fees from Thompson prior to completing all of the loan modification services he had contracted to perform.

As of February 2012, Thompson had not delivered every financial document to respondent that respondent had requested, and as of February 2012, respondent had not submitted a loan modification request to Thompson's lender. (Exhibit WW.) In the beginning of February 2012, Thompson requested a refund. (Exhibit DDD.). On February 12, 2012, CDA refunded $1,450 to Thompson. (Exhibit CCC.)

Conclusions

Count Three - (§ 6106.3, subd. (a) [Violation of Civil Code section 2944.7, subd. (a)])

By claiming, demanding, charging, collecting, or receiving compensation before he fully performed each and every loan modification service he had contracted to perform or represented

he would perform, respondent violated Civil Code section 2944.7, subdivision (a). As such, respondent has violated section 6106.3.

Case No. 12-O-10964 – The Orcini Matter

Facts

On November 30, 2010, Teresa Orcini (Orcini) employed respondent, through CDA, to provide loan modification services related to a property she owned, located on Clinton Street in Los Angeles. The mortgage servicer for the Clinton Street property was Wachovia (now Wells Fargo). (Exhibit GGG.) On December 10, 2010, CDA withdrew $1,850 from Orcini's bank account as payment for legal services. (Exhibit MMM.) On January 10, 2011, CDA withdrew $595 from Orcini's bank account. (Exhibit MMM.) Respondent collected these fees from Orcini prior to completing all of the loan modification services he had contracted to perform.

On February 24, 2011, a trustee's sale was scheduled for March 21, 2011, on the Clinton Street property. (Exhibit JJJ.) On March 14, 2011, CDA sent Wachovia a request to modify the loan on the Clinton Street property. (Exhibit LLL.) On March 21, 2011, CDA withdrew $1,850 from Orcini's account bank account as payment for legal services. (Exhibit MMM.) On May 31, 2011, Wachovia denied the request for a loan modification because of a decrease in Orcini's income. (Exhibit DDD.)

On June 29, 2011, Orcini employed respondent, through CDA to provide legal services related to a rental property she owned, located on North Kenmore Street in Los Angeles. Chase was the mortgage servicer for the North Kenmore property. (Exhibit QQQ.) On July 15, 2011, CDA attempted to collect funds from Orcini's bank account as payment for legal services. The request for payment was denied due to insufficient funds on July 15, 2011. (Exhibit SSS.)

Conclusions

Count Four - (§ 6106.3, subd. (a) [Violation of Civil Code section 2944.7, subd. (a)])

By claiming, demanding, charging, collecting, or receiving compensation before he fully performed each and every loan modification service he had contracted to perform or represented he would perform, respondent violated Civil Code section 2944.7, subdivision (a). As such, respondent has violated section 6106.3.

Case No. 12-O-12239 – The Giordano Matter

Facts

On March 31, 2011, Anthony Giordano employed respondent, through CDA, to provide loan modification services on his behalf. Giordano's mortgage was serviced by Aurora. (Exhibit UUU.) On April 15, 2011, CDA withdrew $600 from Giordano's bank account as payment for legal services. (Exhibit FFFF.) On April 29, 2011, CDA withdrew $600 from Giordano's bank account as payment for legal services. (Exhibit FFFF.) On May 23, 2011, CDA withdrew $595 from Giordano's bank account. (Exhibit FFFF.) On June 13, 2011, CDA withdrew $600 from Giordano's bank account as payment for legal services. (Exhibit FFFF.) On June 23, 2011, CDA withdrew $600 from Giordano's account as payment for legal services. (Exhibit FFFF.) Respondent collected these fees from Giordano prior to completing all of the loan modification services he had contracted to perform.

On January 10 and 18, 2012, CDA submitted a loan modification proposal to Aurora on Giordano's behalf. (Exhibits DDDD, EEEE.) On February 8, 2012, Aurora denied Girodano's loan modification based on a high debt to income ratio. (Exhibit TTT.)

Conclusions

Count Five - (§ 6106.3, subd. (a) [Violation of Civil Code section 2944.7, subd. (a)])

By claiming, demanding, charging, collecting, or receiving compensation before he fully performed each and every loan modification service he had contracted to perform or represented he would perform, respondent violated Civil Code section 2944.7, subdivision (a). As such, respondent has violated section 6106.3.

Case No. 12-O-12703 – The Fallah Matter

Facts

On July 19, 2011, Hassan Fallah employed respondent, through CDA, to provide loan modification services on his behalf. (Exhibit IIII.) On July 22, 2011, CDA withdrew $1,450 from Fallah's bank account as payment for legal services. (Exhibit TTTT.) On August 5, 2011, CDA withdrew $595 from Fallah's bank account. (Exhibit TTTT.) On September 16, 2011, CDA withdrew $1,450 from Fallah's bank account as payment for legal services. (Exhibit TTTT.) Respondent collected these fees from Fallah prior to completing all of the loan modification services he had contracted to perform.

On September 20, 2011, CDA submitted a financial package to Bank of America on Fallah's behalf. (Exhibit QQQQ.) On February 10, 2011, Bank of America denied Fallah's loan modification proposal. (Exhibit RRRR.)

Conclusions

Count Six - (§ 6106.3, subd. (a) [Violation of Civil Code section 2944.7, subd. (a)])

By claiming, demanding, charging, collecting, or receiving compensation before he fully performed each and every loan modification service he had contracted to perform or represented he would perform, respondent violated Civil Code section 2944.7, subdivision (a). As such, respondent has violated section 6106.3.

Case No. 12-O-14401 – The Frias Matter

Facts

On June 30, 2011, Jose Frias employed respondent, through CDA, to provide loan modification services on his behalf. (Exhibit XXXX.) On July 5, 2011, CDA withdrew $595 from Frias's bank account. (Exhibit GGGGG.) On July 11, 2011, CDA withdrew $1,600 from Frias's bank account as payment for legal services. (Exhibit GGGGG.) On September 20, 2011, CDA withdrew $1,600 from Frias's account as payment for legal services. (Exhibit GGGGG.) Respondent collected these fees from Frias prior to completing all of the loan modification services he had contracted to perform.

On September 26, 2011, CDA submitted a financial package to Chase on Frias's behalf. (Exhibit EEEEE.) On October 7, 2011, Chase informed CDA that Frias's application for a loan modification was declined. (Exhibit VVVV.) On October 11, 2011, Chase informed CDA that Frias's loan modification application had not yet been declined. (Exhibit VVVV.) On November 28, 2011, CDA resubmitted Frias's application for a loan modification. (Exhibit VVVV.)

On January 17, 2012, Frias sent an email to CDA requesting a refund. On March 30, 2012, CDA submitted updated documentation to Chase, and on June 5, 2012, Frias was approved for a loan modification. (Exhibit FFFFF.)

Conclusions

Count One - (§ 6106.3, subd. (a) [Violation of Civil Code section 2944.7, subd. (a)])

By claiming, demanding, charging, collecting, or receiving compensation before he fully performed each and every loan modification service he had contracted to perform or represented he would perform, respondent violated Civil Code section 2944.7, subdivision (a). As such, respondent has violated section 6106.3.

Case No. 12-O-14602 – The Garza Rosel Matter

Facts

On September 25, 2011, Judy Garza Rosel (Garza Rosel) employed respondent, through CDA, to provide loan modification services on her behalf. (Exhibit NNNNN.) On October 4, 2011, CDA withdrew $1,450 from Garza Rosel's account as payment for legal services. (Exhibit WWWWW.) On October 14, 2011, CDA withdrew $595 from Garza Rosel's account. (Exhibit WWWWW.) On November 9, 2011, CDA withdrew $1,450 from Garza Rosel's account as payment for legal services. (Exhibit WWWWW.) Respondent collected these fees from Garza Rosel prior to completing all of the loan modification services he had contracted to perform.

On November 14, 2011, CDA submitted a loan modification package to Garza Rosel's lender, Saxon. (Exhibit QQQQQ.) On January 30, 2012, Saxon informed CDA that Garza Rosel's home loan was sold to Specialized Loan Servicing (SLS) on January 30, 2012. (Exhibit HHHHH.) On February 27, 2012, CDA submitted a new financial package to SLS on Garza Rosel's behalf. (Exhibit SSSSS.) On June 1, 2012, Garza Rosel was approved for a trial loan modification, but Garza Rosel's home was sold in foreclosure proceedings on June 4, 2012. (Exhibit HHHHH.)

Conclusions

Count Two - (§ 6106.3, subd. (a) [Violation of Civil Code section 2944.7, subd. (a)])

By claiming, demanding, charging, collecting, or receiving compensation before he fully performed each and every loan modification service he had contracted to perform or represented he would perform, respondent violated Civil Code section 2944.7, subdivision (a). As such, respondent has violated section 6106.3.

Case No. 12-O-17028 – The Bringman Matter

Facts

On September 23, 2011, Hal Bringman employed respondent, through CDA, to provide loan modification services on his behalf for a rental property he owned located on Palm Avenue in West Hollywood, California. (Exhibit OOOOOO.) On September 26 and 29, 2011, CDA attempted to collect $1,450 from Bringman's bank account as payment for legal services, but those attempts were denied due to insufficient funds in Bringman's bank account. (Exhibit SSSSSS.) On October 6, 2011, CDA withdrew $1,450 from Bringman's bank account as payment for legal services. (Exhibit SSSSSS.) On December 5, 2011, CDA withdrew $1,450 from Bringman's bank account as payment for legal services. (Exhibit SSSSSS.) Respondent collected these fees from Bringman prior to completing all of the loan modification services he had contracted to perform.

On January 17, 2012, CDA submitted Bringman's financial package to the lender on the Palm Avenue property, Bank of America. (Exhibit RRRRRR.) On June 25, 2012, CDA learned that Bank of America had denied Bringman's application for a loan modification due to investor guidelines. (Exhibit IIIIII.)

On November 22, 2011, Bringman employed respondent, through CDA, to provide legal services on his behalf for his primary residence located at on Valevista Trail in Los Angeles. (Exhibit AAAAAA.) On November 28, 2011, CDA withdrew $1,250 from Bringman's bank account as payment for legal services. (Exhibit KKKKKK.) On January 13, 2012, CDA withdrew $1,250 from Bringman's bank account as payment for legal services. (Exhibit KKKKKK.) Respondent collected these fees from Bringman prior to completing all of the loan modification services he had contracted to perform.

On January 30, 2012, CDA submitted Bringman's financial package to Bank of America, the lender on the Valevista Trail property. (Exhibit FFFFFF.)

Conclusions

Count Three - (§ 6106.3, subd. (a) [Violation of Civil Code section 2944.7, subd. (a)])

By claiming, demanding, charging, collecting, or receiving compensation before he fully performed each and every loan modification service he had contracted to perform or represented he would perform, respondent violated Civil Code section 2944.7, subdivision (a). As such, respondent has violated section 6106.3.

Aggravation[14]

Multiple Acts/Pattern of Misconduct (Std. 1.2(b)(ii).)

Respondent committed multiple acts of misconduct. This is an aggravating factor.

Harm to Clients (Std. 1.2(b)(iv).)

Respondent's clients were harmed by paying advance fees contrary to the law. There is some harm from respondent's conduct, but this harm is not particularly significant. The only harm these clients suffered was the loss of use of their money during the period respondent sought to obtain them a modification of their loan. Since this decision requires respondent to repay the illegally obtained fees, these clients will have received legal services at no cost to them.

Indifference Toward Rectification/Atonement (Std. 1.2(b)(v).)

The State Bar contends that respondent shows indifference by virtue of the fact that he continues to handle cases using a business model that has been repudiated by the review department in *Taylor*. It is clear that respondent has taken extraordinary measures to attempt to

[14] All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

determine the appropriate interpretation of Civil Code section 2944.7. It is also understandable that respondent was confused as to the State Bar's position on unbundling, given the varying interpretations by Greenfield, Hom, Tim Byer, Anderson, and others. However, despite his disagreement with the holding in *Taylor*, it is now the law, and respondent has continued to violate SB 94 in the face of what the review department opinion characterizes as its plain and unambiguous meaning. While respondent did attempt to change his retainer agreement into three separate documents at the suggestion of Tim Byer of the Office of the Chief Trial Counsel, this act alone is insufficient to avoid what the review department refers to as the unambiguous meaning of the statute. Therefore, the court finds that respondent's continued violation of the proscription against unbundling represents indifference within the meaning of Standard 1.2(b)(v).

Mitigation

No Prior Record (Std. 1.2(e)(i).)

Respondent has been a lawyer since 1978, and has no prior record of discipline. This is a substantial mitigating factor.

Good Faith (Std. 1.2(e)(ii).)

For the entire time that respondent represented the clients involved in this matter, he actively sought to ascertain the exact meaning of the newly enacted SB 94. He played an active role in the community of lawyers and lay people seeking to clarify the law, including Feldman, Greenfield, and Andelman. When advised to make an appropriate change to his business model, he readily sought to comply with that advice. As such, up until the final decision in *Taylor*, the court finds he acted in good faith with respect to the clients involved in this action. However, this finding of mitigation based on good faith is diminished somewhat by respondent's failure to

conform his conduct to the rule of law established in *Taylor,* as is set forth in the above discussion of standard 1.2(b)(v).

Good Character (Std. 1.2(e)(vi).)

Respondent presented a broad cross section of individuals, including attorneys, who testified on his behalf regarding his good character. All of those that testified in court were aware of the nature of the charged misconduct. Those that provided declarations (exhibits WWWWWW, XXXXXX, and YYYYYY) did not indicate any knowledge of the allegations of misconduct. Andelman, also provided character evidence in addition to his evidence on culpability issues. All of these individuals thought very highly of respondent and praised his honesty, integrity, and work ethic. While the mitigating impact of the declarations is diminished somewhat by their apparent lack of knowledge of the allegations alleged against respondent, on the whole, the court finds that respondent's character evidence should be given some mitigating effect.

Discussion

In determining the appropriate discipline to recommend in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. Standard 1.3 provides that the primary purposes of disciplinary proceedings "are the protection of the public, the courts, and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession."

Standard 2.10 is applicable to the misconduct in this matter. Standard 2.10 provides that culpability of a member of a violation of section 6106.3 shall result in reproval or suspension according to the gravity of the offense or the harm, if any, to the victim.

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety.

(*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) As the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn.2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

The court also looked to the case law for guidance. The court found *In the Matter of Taylor, supra,* 5 Cal. State Bar Ct. Rptr. 221, to be helpful. In *Taylor,* the attorney, in eight client matters, was found culpable of charging illegal fees in violation of section 6106.3. No moral turpitude was involved. In aggravation, the attorney committed multiple acts of misconduct, caused significant harm, and demonstrated indifference. In mitigation, the attorney presented good character evidence. The Review Department recommended that the attorney be suspended for a period of two years, with the execution stayed, and that he be placed on probation for two years including a six-month period of actual suspension and/until full payment of restitution.

The present case is similar to *Taylor* in that it involves violations of Civil Code § 2944.7 and a similar number of clients. *Taylor,* however, involves more aggravation and less mitigation than the present matter. Specifically, respondent's extensive legal career prior to the present misconduct is a significant distinguishing factor.

Another significant difference between the present matter and *Taylor* is the great extents respondent went to determine the propriety of his business model. As detailed above, respondent had reason to be confused as to whether an attorney could unbundle advanced fees in loan modification matters. Even from the State Bar, there were conflicting opinions and recommendations on this subject. It wasn't until the review department's decision in *Taylor* that this issue was adequately addressed and clarified.

Consequently, the court finds appropriate a lower level of discipline than that which was recommended in *Taylor*. That being said, the court is concerned by respondent's indifference toward the review department's decision in *Taylor*. Respondent's failure to modify his practice based on the clarity derived from the review department's guidance demonstrates to the court that a period of actual suspension is warranted.

Therefore, having considered the evidence, the standards, and the case law, the court concludes that, among other things, a 90-day period of actual suspension is sufficient to protect the public, the courts, and the legal profession.

Recommendations

It is recommended that respondent Robert G. Scurrah, State Bar Number 82766, be suspended from the practice of law in California for one year, that execution of that period of suspension be stayed, and that respondent be placed on probation[15] for a period of two years subject to the following conditions:

1. Respondent Robert G. Scurrah is suspended from the practice of law for the first 90 days of probation, and he will remain suspended until the following requirements are satisfied:

    i. Respondent must make restitution to Mary von Goetz, in the amount of $3,467 plus 10 percent interest per year from July 5, 2011 (or reimburse the Client Security Fund, to the extent of any payment from the fund to Mary von Goetz, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles;

    ii. Respondent must make restitution to Teresa Orcini, in the amount of $4,295 plus 10 percent interest per year from March 21, 2011 (or reimburse the Client Security Fund, to the extent of any payment from the fund to Teresa Orcini, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles;

[15] The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

iii. Respondent must make restitution to Anthony Giordano, in the amount of $2,995 plus 10 percent interest per year from June 23, 2011 (or reimburse the Client Security Fund, to the extent of any payment from the fund to Anthony Giordano, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles;

iv. Respondent must make restitution to Hassan Fallah, in the amount of $3,495 plus 10 percent interest per year from September 16, 2011 (or reimburse the Client Security Fund, to the extent of any payment from the fund to Hassan Fallah, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles;

v. Respondent must make restitution to Jose Frias, in the amount of $3,795 plus 10 percent interest per year from September 20, 2011 (or reimburse the Client Security Fund, to the extent of any payment from the fund to Jose Frias, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles;

vi. Respondent must make restitution to Judy Garza Rosel, in the amount of $3,495 plus 10 percent interest per year from November 9, 2011 (or reimburse the Client Security Fund, to the extent of any payment from the fund to Judy Garza Rosel, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles;

vii. Respondent must make restitution to Hal Bringman, in the amount of $5,400 plus 10 percent interest per year from January 13, 2012 (or reimburse the Client Security Fund, to the extent of any payment from the fund to Hal Bringman, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles;

viii. If respondent remains suspended for two years or more as a result of not satisfying the preceding requirements, he must also provide proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law before his suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)

2. Respondent must also comply with the following additional conditions of probation:

i. During the period of probation, respondent must comply with the State Bar Act and the Rules of Professional Conduct of the State Bar of California;

ii. Respondent must submit written quarterly reports to the State Bar's Office of Probation (Office of Probation) on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than 30 days, the report must be submitted on the next following quarter date, and cover the extended period.

In addition to all the quarterly reports, a final report, containing the same information is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probationary period;

iii. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation, which are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein;

iv. Within 10 days of any change, respondent must report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California 94105-1639, **and** to the Office of Probation, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code;

v. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request; and

vi. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

3. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for one year will be satisfied and that suspension will be terminated.

Multistate Professional Responsibility Examination

It is recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of the Supreme Court order imposing discipline in this matter, or during the period of respondent's suspension, whichever is longer and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

California Rules of Court, Rule 9.20

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: August _____, 2013

RICHARD A. HONN
Judge of the State Bar Court